

## FEDERAL REGULATION OF GAMBLING

WHILE many people find nothing immoral in gambling,<sup>1</sup> few can ignore its harmful impact on society and political life. Gambling on dice or card games is hardly a social evil.<sup>2</sup> But events like the recent basketball scandal,<sup>3</sup> together with the revelations of the Senate Crime Committee,<sup>4</sup> demonstrate the gravity of problems created by big-time operations of professional gamblers. Twenty billion dollars is said to change hands annually as a result of illegal gambling activities in the United States.<sup>5</sup> According to the Committee, two nation-wide criminal syndicates use gambling profits to finance rackets like commercialized prostitution and the sale and distribution of narcotics.<sup>6</sup> Frequently, the gambling industry corrupts state and local government. The Senate Committee discovered evidence of bribery or "protection" payments to police officers, political pressure on important officials to protect gambling operations, and actual participation of these individuals in the business of

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1. In the broad popular sense, the term "gambling" simply means taking a chance. But if the word is to have any functional significance, it requires a more precise definition. One fairly satisfactory definition is as follows: "Gambling is a betting or wagering, by agreement between two or more persons, whereby the money, property or other thing of value of one or more of the parties to the agreement becomes the property of the other party or parties to the agreement, without legal consideration, upon the happening of an uncertain, future event designated for that purpose." MACDOUGALL, *SPECULATION AND GAMBLING* 22 (1936).

The discussion of gambling in this comment is confined to those areas where the professional gambler plays a prominent role—as distinguished, for example, from gambling which occurs in social card games. Examination of the activities on stock and commodity exchanges, which contain an element of professional gambling, is, however, excluded. For information on this topic, consult FLYNN, *SECURITY SPECULATION* (1934); MACDOUGALL, *supra*.

2. For a contrary view see *We Can't Afford Social Gambling*, *Good Housekeeping*, June, 1949, p. 39.

3. See *Game at its Worst: Fix Scandal Staggers College Basketball*, *Life*, Jan. 29, 1951, pp. 86-7.

4. The full name of the committee was the Special Senate Committee to Investigate Organized Crime in Interstate Commerce. It was created by Senate Resolution 202, 81st Congress, in the spring of 1950, and terminated September 1, 1951. Under the chairmanships of Senators Kefauver and O'Connor, the committee held hearings in fourteen cities and collected testimony from over 600 witnesses. Four reports were published containing findings and recommendations.

5. SEN. REP. NO. 141, 82d Cong., 1st Sess. 13 (1951). The actual income accruing to professional gamblers from this turnover, however, has never been estimated.

6. The Senate Crime Committee believes that one of these syndicates is controlled by remnants of the Capone gang and the other by Frank Costello and Joe Adonis. The Committee also suggests that a shadowy organization known as the Mafia acts as arbitrator and coordinator for the two groups. Gambling has supplanted bootlegging as the chief source of revenue for the criminal activities of these syndicates. See SEN. REP. NO. 307, 82d Cong., 1st Sess. 144-50 (1951).

gambling.<sup>7</sup> In addition, large-scale betting on sports has tempted gamblers to "fix" these contests by bribing athletes, thus extending corruption to college campuses.

A significant factor in the nation's gambling problem is the failure of state efforts at repression. Although all states have anti-gambling laws of one type or another,<sup>8</sup> they are weakly and sporadically enforced, partly because of connivance between gamblers and community officials. A customary pattern is to conduct periodic raids against betting establishments to give the appearance of enforcement; those arrested are usually released after paying small fines, and "business as usual" continues once the excitement has quieted down.<sup>9</sup>

The apparent popularity of gambling and the failure of attempts to ban it suggest that one possible solution to the problem lies in legalization. Viewed as a long range prospect, this appears plausible. Present undesirable effects of gambling possibly stem from the fact of its illegality rather than from any inherent evil in the activity itself. Like Prohibition, anti-gambling laws may cause more injury to society than they prevent. Conceivably, gambling might emerge a legitimate business, with corruption of public officials ceasing as it becomes unnecessary. Legalization might permit Americans to indulge in games of chance in the same way they now enjoy other forms of amusement.

But inviting as legalization may appear to long range planners, it is no answer to the immediate problem which the nation faces. Whether because states have made it illegal or for other reasons, gambling is now firmly in the hands of organized crime; it is unlikely this control could be shaken off in a short period. The temptation to "fix" would continue, and resulting bribery might still occur. Legalization in only a few states might add to the amount of gambling while simultaneous illegality elsewhere would make continued nationwide underworld control likely. On the other hand, concerted legalization of gambling by all states and the federal government is probably not politically feasible today, and cannot be considered a realistic possibility for purposes of immediate planning.

Since legalization is not a ready answer to the gambling problem, a more workable scheme of regulation seems the best alternative. Ineffectuality of state laws suggests that federal action is needed. At present a few federal statutes, based primarily on interstate commerce and postal powers, outlaw

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7. SEN. REP. NO. 141, 82d Cong., 1st Sess. 13-31 (1951); SEN. REP. NO. 307, 82d Cong., 1st Sess. 30-94, 183-7 (1951). Such evidence has been reported in many other places. See, e.g., DRAKE & CLAYTON, *BLACK METROPOLIS* 470-94 (1945); VAN DEVANDER, *THE BIG BOSSES* (1944); STEFFENS, *THE SHAME OF THE CITIES* (1904); STATE OF CALIFORNIA, *SECOND AND THIRD PROGRESS REPORTS OF THE SPECIAL CRIME STUDY COMMISSION ON ORGANIZED CRIME* (1949).

8. See pp. 1398-9 *infra*.

9. See Lawrence, *Bookmaking*, 269 *ANNALS* 46, 53 (1950).

certain types of gambling enterprises. The Senate Crime Committee has proposed and Congress is now considering several new laws intended to deal a knock-out blow to the gambling industry. If enacted, these federal measures will supplement existing state laws regulating gambling. A brief examination of the latter must, therefore, precede discussion of present and proposed federal anti-gambling laws.

### THE PATTERN OF STATE REGULATION

#### *Statutory Control*

Statutes regulate gambling in all states; constitutional provisions and common law play a distinctly secondary role.<sup>10</sup> The statutes, varying widely in coverage and strictness of enforcement, form a haphazard pattern of regulation. Some states outlaw gambling of an organized commercial character in all its forms.<sup>11</sup> Most, however, prohibit only particular kinds of gambling and legalize or ignore other types.

The common bans are on bookmaking, slot machines, lotteries, numbers games, and gaming houses.<sup>12</sup> Bookmaking is prohibited in all states except

10. For example, in New York the constitution prohibits the legislature from authorizing any "lottery or the sale of lottery tickets, pool selling, bookmaking or any other kind of gambling." In 1939, however, this provision was amended to except "pari-mutuel betting on horse races as may be prescribed by the Legislature." N. Y. CONST. Art. I, § 9.

Occasionally gaming houses or other forms of gambling are enjoined as public nuisances. *E.g.*, *Mullen v. Mosley*, 13 Idaho 457, 90 Pac. 986 (1907) (slot machines); *Woods v. Cottrell*, 55 W. Va. 476, 47 S.E. 275 (1904) (gaming house). In some jurisdictions, statutes specifically extend the law of nuisances to gambling enterprises. *E.g.*, *State ex. rel. Igoe v. Joynt*, 341 Mo. 788, 110 S.W. 2d 737 (1937).

In addition, some cases have dealt with the enforceability of wagering contracts. Such contracts are considered illegal and unenforceable in the New England States, even in the absence of anti-gambling statutes. *Love v. Harvey*, 114 Mass. 80 (1873). This view is often accepted as the "American common law" doctrine. *Irwin v. Williar*, 110 U.S. 499 (1884). However, a few jurisdictions have adopted the English rule and treat wagering contracts as void but not illegal where the activity betted on is not made a crime by statute. Thus in states where gambling contracts are illegal, the obligor may have a sound defense; but in others where his defense is only personal the holder in due course may recover. See BRITTON, *BILLS AND NOTES* § 127 (1943); Note, 21 TEMP. L.Q. 276 (1948). In many states, however, statutes now permit losers in gambling transactions to recover from winners. See *Bauman v. Erickson*, 288 N.Y. 133, 41 N.E.2d 920 (1942); Note, *Recovery of Losses from Winner by Loser*, 27 MINN. L. REV. 94 (1942).

For the relationship of gambling contracts to insurance, see PATTERSON, *CASES AND MATERIALS ON INSURANCE* 118-68 (1947).

11. *E.g.*, Connecticut, North Carolina, Texas, and Wisconsin.

12. For a fairly complete statement of these prohibitions, see Bishop, *Gambling Laws—Legal and Social Aspects*, 18 B.U.L. REV. 210 (1938).

Nevada, and all but five states outlaw the slot machine.<sup>13</sup> Under most laws, gambling devices found in gaming establishments may be seized and destroyed.<sup>14</sup> Many statutes as interpreted penalize only the professional gambler, as distinguished from his "customer" or an occasional participant in a gambling game.<sup>15</sup>

These laws, however, have proved difficult to administer. Manufacturers and proprietors frequently claim that particular devices are not lotteries or slot machines but are intended for amusement only.<sup>16</sup> Moreover, statutes are enforced unequally. Thus, when raffles and lotteries are used to raise funds for a worthy cause, political pressure makes police refrain from interfering<sup>17</sup> with

13. Nevada has no restrictions. Washington and Montana permit slot machines in private clubs, and Maryland has legalized machines in two counties. In Idaho, the machines have been legalized on a local option basis. See *Hearings before Committee on Interstate and Foreign Commerce on S. 3357 and H.R. 6736*, 81st Cong., 2d Sess. 11-14 (1950).

14. *E.g.*, FLA. STATS. ANN. § 901.19 (1944); IND. STATS. ANN. § 9-605 (Burns, 1942). In addition, some statutes provide that money seized with gambling devices can be disposed of only by the state. In the absence of such a statute, however, an operator of seized gambling devices may generally recover the money found therewith. See Note, 23 MINN. L. REV. 976 (1939).

15. *E.g.*, *People v. Goldstein*, 295 N.Y. 61, 65 N.E.2d 169 (1946); *State v. Hicks*, 101 Kan. 782, 168 Pac. 861 (1917). In general, violations by gamblers are merely misdemeanors; but some forms of gambling, such as maintenance of lotteries or gaming house, are designated as felonies in certain states. See Ploscowe, *The Law of Gambling*, 269 ANNALS 1, 3 (1950).

16. In the lottery cases, the strict definition of a lottery as "a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance" is the chief barrier to effective enforcement. See *People v. Miller*, 271 N.Y. 44, 2 N.E.2d 38 (1936). Courts let schemes escape the statutory sanctions where one or more of the necessary elements of a lottery is absent or disguised. For example, some courts say that where the public may obtain a chance at a prize offered by theater "bank nights" without buying admission tickets, the scheme lacks consideration and, therefore, is not a lottery. *State v. Lynch*, 192 Okl. 497, 137 P.2d 949 (1943); *State v. Danz*, 140 Wash. 546, 250 Pac. 37 (1926). For similar problems under the federal lottery laws, see pp. 1402-3 *infra*.

For an analysis of judicial decisions on slot machines, see *People v. Gravenhorst*, 32 N.Y.S.2d 760 (1942). Free-play pinball machines are permitted in most states. See Note, *Free Play on Pinballs*, 36 VA. L. REV. 102 (1950). On the other hand, New York City prohibits the use of pinball machines entirely, without regard to whether or not the machine or the proprietor pays off. New York City Local Law No. 45 (1948).

17. See Ploscowe, *supra* note 15, at 6. Occasionally, however, charitable lotteries are prosecuted; and the courts generally hold that they are in violation of law. *E.g.*, *Harri-man Institute v. Children's Hospital*, 43 N.M. 1, 84 P.2d 1088 (1938); *Comm. v. O'Connell*, 293 Mass. 459, 200 N.E. 269 (1936).

Federal law enforcement officers are similarly reluctant to prosecute charitable lotteries. See *Hearings before Special Committee to Investigate Organized Crime in*

such illegal activities. A few states sanction gambling schemes for charitable purposes.<sup>18</sup>

### *Experience with Legalization*

Several states have experimented with legalizing certain types of gambling. During colonial days, state-authorized lotteries to raise money for public works were common.<sup>19</sup> However, political corruption and speculation soon developed, and by the 1840's most of these lotteries were prohibited.<sup>20</sup> A repetition of this pattern followed the Civil War.<sup>21</sup> More recently many states legalized certain types of gambling, only to later outlaw them.<sup>22</sup>

The most prevalent type of legal gambling today is pari-mutuel betting at licensed race and dog tracks, permitted in twenty-five states.<sup>23</sup> About one

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*Interstate Commerce pursuant to S. Res. 202, 81st Cong., 2d Sess. and 82d Cong., 1st Sess. pt. 2, 48-9 (1950-1):*

"Chief Post Office Inspector Garner. 'Yes; I have seen publicity which would indicate that the general public is unhappy when we issue a fraud order against a charitable institution that may be well-meaning but still violating the law in operating a gift enterprise or a lottery.'

"Senator Kefauver. 'Mr. Garner, I think that sometimes even Members of Congress come down to complain about the postal inspectors stopping some charitable lottery or a lottery conducted by some organization for a good purpose.'

18. In Massachusetts, for example, gambling games such as "beano" may be licensed where the proceeds are used for charitable, religious, fraternal, or educational purposes. MASS. GEN. LAWS. c. 271, § 22A (Ter. ed., 1932).

19. Roads, bridges, canals and schools were financed by these lotteries. And many major colleges, including Harvard, Yale, and Columbia, benefited from the early lotteries. See Blanche, *Lotteries Yesterday, Today, and Tomorrow*, 269 ANNALS 71, 72 (1950).

After the Revolutionary War, lotteries in the seaboard states multiplied even more rapidly. "By 1790 about 2000 legal lotteries were in operation, and the list of drawings and prizes daily required a half column of fine print in the New York newspapers. A legislative session was seldom held anywhere in the country without one or more lottery grants being authorized." ASBURY-DODD, *SUCKER'S PROGRESS* 76-7 (1938).

20. See Blanche, *supra* note 19, at 73.

21. In Louisiana, for example, a licensed lottery gained virtual control of the state government shortly after its authorization. After revelation that the company spent over \$300,000 in bribes during a period of six years, the lottery was voted out of existence in 1892. See Peterson, *Obstacles to Enforcement of Gambling Laws*, 269 ANNALS 9, 15-16 (1950).

22. In Florida, slot machines were legalized in 1935; two years later the law was repealed. In Wyoming, gambling was legalized many years ago; but for the last quarter of a century, it has been unlawful despite many attempts by the state legislature to again license it. At one time horse racing was permitted in Texas but it has been banned for the past several years. In 1947, the Idaho legislature passed a law that permitted municipalities to license slot machines on a local option basis; because of the abuses which occurred, however, several cities canceled all slot-machine licenses in 1949. License revocations were necessary in Massachusetts when licensed church gambling got out of hand. Similar unsuccessful experiments with legalization have occurred in California, Arizona, New Mexico, and other states. See PETERSON, *GAMBLING—SHOULD IT BE LEGALIZED?* 55 (1945).

23. The statutes are listed in Note, *Statutory Trends Toward Legalization of Gambling*, 34 IOWA L. REV. 647, 654 (1949).

Under the pari-mutuel system, the bettors contribute to a common fund and receive a ticket or certificate representing such contribution. The track retains a portion of this

hundred million dollars is collected annually in taxes on pari-mutuel gambling.<sup>24</sup> A nation-wide track protective society guards against "fixing" of races.<sup>25</sup>

Alone among the states, Nevada allows virtually wide-open gambling. Legalization came about in 1931, after a previous experiment failed.<sup>26</sup> Gambling businesses are licensed and taxed by the state.<sup>27</sup> Thus far, the Nevada experience has not resulted in great abuses. But special local conditions—such as the tiny population which makes police surveillance of gambling operations and the activity of racketeers relatively easy—may account for this success. Moreover, recent events like a rise in public relief due to gambling,<sup>28</sup> and the securing of gambling franchises by notorious out-of-state gangsters,<sup>29</sup> may cause a reevaluation of the desirability of Nevada's legalization program.

#### PRESENT FEDERAL REGULATION OF GAMBLING

##### *Anti-lottery Postal and Commerce Statutes*

The inadequacy of early state attempts to curb vast lottery enterprises roused Congress to action. In 1890, a statute was passed prohibiting use of

fund and at the end of the race divides the remainder among those holding tickets on winning horses. *Ibid.*

24. Day, *Horse Racing and the Pari-Mutuel*, 269 ANNALS 55, 58 (1950).

25. For an account of the functions of this society, the Thoroughbred Racing Association, see Day, *supra* note 24, at 58-61 (1950).

The situation in Portland, Oregon is an interesting case study of possible results of pari-mutuel betting. Through a political deal made with the state's dominant agricultural groups, in which 36 county fairs split the state's share of the pari-mutuel take, dog-racing tracks operate profitably and under full protection of the law. All other forms of gambling have been eliminated, thus funneling bettor's dollars into the tracks, which are owned by out-of state promoters. Business in the community takes a sharp slump when the greyhounds are running, and bill defaults mount up. Neuberger, *Oregon Goes to the Dogs*, 173 THE NATION 189 (1951).

26. The 1931 law, amended in 1941, made legal what was going on under cover on a smaller scale since 1910, when gambling was banned after limited licensing proved unworkable. Except for lotteries, which are banned by the state constitution, the act sets up regulations and license fees for all types of gambling. NEV. COMP. LAWS ANN. § 3302 (Supp. 1938). See McDonald, *Gambling in Nevada*, 269 ANNALS 30 (1950).

27. The State Tax Commission, comprising seven commissioners, including the Governor, administers the law. Approximately \$1,125,000 in gross taxes and license fees and \$280,000 in table fees has been collected each year since the two per cent levy on gambling enterprises became effective. This constitutes 16.98 per cent of Nevada's revenue for administrative purposes. McDonald, *supra* note 26, at 32, 33.

28. "Prevalence of wide-open gambling has increased the relief burden for the Red Cross, the Salvation Army, and similar agencies, because so many people, some of whom have families, come here and lose all their money and are destitute." *Id.* at 33.

29. See KEFAUVER, *CRIME IN AMERICA* 124-8 (1951).

the mails for distribution or sale of any lottery or similar scheme;<sup>30</sup> and in 1895 Congress outlawed foreign importation and interstate transportation of lottery tickets.<sup>31</sup> Identical criminal penalties are prescribed for violations of these statutes,<sup>32</sup> and the constitutionality of both has been sustained.<sup>33</sup> Supplementing these two provisions is the mail fraud statute,<sup>34</sup> aimed at any scheme for fraudulently obtaining money or property by use of the mails.<sup>35</sup>

Several spectacular prosecutions occurred under these laws. Thus in 1942 55 promoters in 16 states were convicted for using the mails to promote a lottery for which 12,000,000 tickets had been printed and approximately \$10,000,000 had been collected.<sup>36</sup> Some schemes are nipped early. Illustrative is the Federal Bureau of Investigation's seizure of 78,000 Irish sweep-stake tickets valued at \$1,800,000 from an airplane landing in this country.<sup>37</sup>

Despite these achievements, however, enforcement of postal anti-lottery laws is hampered by several factors. Post office inspectors, who are charged with enforcing the criminal postal laws, can give lotteries only limited attention.<sup>38</sup> Investigations are further restricted because first class mail cannot be opened unless suspected of containing unmailable matter.<sup>39</sup> And complaints are rare since the average person, who spends only a small sum for a lottery ticket, seldom protests even if he later believes the scheme was fraudulent.<sup>40</sup>

Moreover, judicial and administrative interpretation of the federal anti-lottery statutes leave several important types of gambling schemes outside the reach of these laws. Courts universally hold that the three essentials

30. The prohibition covers "any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance." 18 U.S.C. § 1302 (Supp. 1950).

31. 18 U.S.C. § 1301 (Supp. 1950).

32. \$1000 fine, or imprisonment up to two years, or both. 18 U.S.C. §§ 1301, 1302 (Supp. 1950).

33. *Champion v. Ames*, 188 U.S. 321 (1903) (sustaining § 1301); *In re Rapier*, 143 U.S. 110 (1892) (sustaining § 1302).

34. 18 U.S.C. § 1341 (Supp. 1950).

35. The penalties are \$1000, or imprisonment up to five years, or both. *Ibid.*

36. *Hearings, supra* note 17, at 249. Additional examples are the Canadian National Lottery prosecution—the enterprise had milked the public of \$450,000—and the Gold Bond Lottery prosecution, in which 71 defendants were convicted. *Id.* at 36-43, 249.

37. See Deland, *The Facilitation of Gambling*, 269 ANNALS 21, 23 (1950).

38. The work of the post office inspectors is roughly divided in two categories: (1) investigation of matters relating to the quality of postal service to the public; and (2) apprehension of violators of criminal postal laws. Under the latter heading, forging and altering of money orders, postal notes, and postal savings certificates, fraudulent use of the mails, and the mailing of explosives, poisons, or obscene matter must be investigated as well as possible violations of the lottery laws. *Hearings, supra* note 17, at 34-5.

39. 18 U.S.C. § 1717(c) (Supp. 1950). When mail is believed to contain lottery matter, the addressee is called to the post office to open the letter in the presence of postal authorities. If lottery matter is found, it is disposed of according to law. See Deland, *supra* note 37, at 22.

40. *Hearings, supra* note 17, at 43.

of a lottery are (1) consideration, (2) prize, and (3) lot or chance.<sup>41</sup> Various guessing contests, as well as conventional lottery and sweepstake schemes, satisfy these requirements.<sup>42</sup> But punchboards, push cards, and certain chain letters have been held not to.<sup>43</sup> Recently, in *United States v. Rich*,<sup>44</sup> a book-making enterprise, which used the mails to advertise the taking of bets on sports events and elections, was also held not to be a "lottery, gift enterprise, or similar scheme." The government argued that when bets are placed with a bookmaker the probability of winning is so small that such betting is a mere guessing contest. But the court declared that "knowledge, skill, and judgment" entered into the selections.<sup>45</sup> The government failed to appeal the case.

### *The Slot Machine Statute*

Invented in 1895, the slot machine quickly became a familiar phenomenon, until today it forms the basis for a highly organized, lucrative, and corrupt business. In Chicago, ten large firms manufacture "one-armed bandits" and other closely related coin-operated gambling devices. From here the machines, although illegal in 43 states, have until recently been distributed openly throughout the country.<sup>46</sup> It is estimated that the annual gross "take" of the slot machine network approximates two billion dollars, with about 20 per cent being reinvested in bribery and corruption of public executive

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41. See *Horner v. United States*, 147 U.S. 449 (1893). For an analysis of this definition as employed in federal cases, see Haley, *The Broadcasting and Postal Lottery Statutes*, 4 GEO. WASH. L. REV. 475 (1936). For state cases, see note 16 *supra*.

42. *E.g.*, *Waite v. Press Publishing Ass'n*, 155 Fed. 58 (6th Cir. 1907) (guessing contest on who would make nearest correct estimate of total popular votes to be cast for office of President of United States on November 8, 1904); 25 OPS. ATT'Y GEN. 286 (1904) (prizes offered to persons offering nearest estimates to total number of paid admissions to World's Fair in St. Louis).

43. *E.g.*, *United States v. 83 Cases of Merchandise Labeled "Honest John"*, 29 F. Supp. 912 (D. Md. 1939) (punchboard scheme); 23 OPS. ATT'Y GEN. 260 (1900) (chain selling scheme). The recent "pyramid club" fad avoided the postal statutes entirely, however, by refraining from use of the mails. *Life*, March 7, 1949, p. 27.

44. 90 F. Supp. 624 (E.D. Ill. 1950).

45. *Id.* at 630. The court observed, despite its holding, that "the bookmaking schemes of defendants are evil in their influence and pernicious in their results [and] are much more evil . . . than many of the schemes which have been held to be lotteries within the meaning of the statute." However, its opinion was that the statute, being "highly penal," must receive a strict construction; and that "the evils the indictments seek to strike here must be reached through broadened legislation by Congress." *Ibid.*

46. Contrary to popular belief, the slot machine has never operated "underground." The ten principal slot machine manufacturers have large plants and advertise widely in trade journals, and some are members of the Chicago Association of Commerce and Industry. See the anonymous article, *Slot Machines and Pinball Games*, 269 ANNALS 62 (1950).



officers.<sup>47</sup> About 175 distributors and 10,000 operators, as well as manufacturers and premise owners, share the profits of this huge enterprise.<sup>48</sup>

After several previous attempts, Congress finally passed a law on January 2, 1951, prohibiting transportation of slot machines and similar gambling devices in interstate commerce.<sup>49</sup> The statute requires manufacturers and dealers to register with the Attorney-General, keep monthly reports on sales and deliveries, and mark each gambling device so that it is individually identifiable. States may except themselves from the act by adopting specific legislation to that effect.<sup>50</sup>

Although the original Senate bill envisioned a broad coverage of coin-operated devices,<sup>51</sup> the definition of "gambling device" as adopted is narrower. Paragraph (1) of the definition deals only with slot machines. It is designed to cover situations where the payoff is over the counter as well as through the machine.<sup>52</sup> Paragraph (2) includes other mechanical devices which operate by means of a coin or token that when inserted may deliver to the player money or property, as the result of the application of an element of

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47. *Hearings, supra* note 13, at 11-12. For further information on the slot machine racket, see Carlisle & Carlisle, *Big Slot Machine Swindle*, *Collier's*, Feb. 19, 1949, p. 26.

48. *Slot Machines and Pinball Games, supra* note 46, at 63.

49. PUB. L. No. 906, 81st Cong., 2d Sess. (Jan. 2, 1951).

50. Congress included this exception because it conceived the purpose of the Act as merely supporting the policies of those states which outlaw slot machines and similar gambling devices. H. R. REP. No. 2769, 81st Cong., 2d Sess. (1950). The use of Federal power via the interstate commerce clause to support state policies is well established. *E.g.*, *Kentucky Whip and Collar Co. v. Illinois Central R.R.*, 299 U.S. 334 (1937) (prohibiting transport of convict made goods to states for sale in violation of state laws); *In re Rahrer*, 140 U.S. 545 (1891) (excluding liquor from states prohibiting same). But Congress is also "free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals, or welfare. . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938). There was no constitutional necessity, therefore, to put the exception in the Act.

51. A gambling device was defined as "any machine or mechanical device, or parts thereof, designed or adapted for gambling or any use by which the user as a result of the application of any element of chance may become entitled to receive, directly or indirectly, any thing of value." S. 3357, 81st Cong., 2d Sess. (1950). Presumably, this definition covered pinball machines, since they can easily be "adapted" for gambling use; and the words "directly or indirectly" were intended to cover over-the-counter payoffs. However, the Department of Justice made no claim that the bill covered punchboards and similar devices, although by a liberal reading the definition would encompass such devices. *Hearings, supra* note 13, at 43.

52. "The term 'gambling device' means—

(1) any so-called 'slot machine' . . . (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property. . . ." PUB. L. No. 906, 81st Cong., 2d Sess. § 1(a)(1) (Jan. 2, 1951). See H.R. REP. No. 2769, 81st Cong., 2d Sess. (1950) for interpretation of this section.

chance.<sup>53</sup> Thus, the section does not preclude payoffs over the counter on pinball games. Paragraph (3) includes sub-assemblies and essential parts in the definition of gambling device.

With minor changes,<sup>54</sup> however, the Act's present definition is probably the wiser. It strikes at the primary evil—the slot machine and devices closely related to it. Pinball machines and similar games are largely divorced, in manufacture and distribution, from the slot machine industry, and have not caused serious abuses.<sup>55</sup> Their inclusion in the statute would add immeasurably to enforcement problems. In addition, the explicitness of the definition should preclude attacks based on the objection of uncertainty—a possible constitutional threat to the vague definition employed in the original bill.<sup>56</sup>

Enforcement of the slot machine statute has not been lax. Recently, the Federal Bureau of Investigation seized 208 gambling devices and arrested fifteen persons under the law, and agents are investigating forty more cases.<sup>57</sup> Still, manufacturers of slot machines may survive the prohibitions established by the Act, since export of gambling devices is not restricted<sup>58</sup> and certain states may take advantage of the exception clause. Moreover, the Act in no wise outlaws gambling by means of slot machines; only the shipment of these devices in interstate commerce is forbidden. In anticipation of this law, many clubs stocked up on slot machines.<sup>59</sup> Over 200,000 now exist in the United States.<sup>60</sup>

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53. PUB. L. No. 906, 81st Cong., 2d Sess. § 1(a) (2) (Jan. 2, 1951).

54. See p. 1409 *infra*.

55. According to the Federation of Tax Administrators, pinball machines and other types of games designed for diversion only "comprise essentially a reputable branch of the amusement industry." See *Slot Machines and Pinball Games*, *supra* note 46, at 69, n. 2. One survey has indicated that 90 per cent of the operators used pinball machines as amusement games only. *Id.* at 68. And recently, pinball and other amusement machine operators, through their trade association, Coin Machine Institute, have embarked on an anti-slot machine campaign in an effort to divorce themselves from the gambling part of the coin-machine industry. See *Hearings*, *supra* note 13, at 87-9.

There is some evidence, however, that pinball machines may be socially harmful for children. *Id.* at 50. But such abuses seem primarily a problem for the local community and the individual family, rather than for congressional action.

56. It is unclear, for example, whether the Department of Justice itself meant to include amusement devices and games within the scope of the original bill. See *Hearings*, *supra* note 13, at 43-72.

57. N.Y. Herald Tribune, July 11, 1951, p. 6, col. 1. In addition, to effectuate the clause in the statute prohibiting use of slot machines in areas under federal jurisdiction, the Army and Navy have confiscated a number of slot machines at officers clubs throughout the country. Time, Jan. 15, 1951, p. 72.

58. There is a limited foreign market for gambling devices. See *Hearings*, *supra* note 13, at 140.

59. Time, Jan. 15, 1951, p. 72.

60. *Slot Machines and Pinball Games*, *supra* note 46, at 64.

*Gambling Ship Statute*

Vessels operated primarily to afford gambling opportunities for wealthy patrons long troubled state and federal governments.<sup>61</sup> In 1948, Congress prohibited the operation of, or gambling on, any gambling ship on the high seas flying an American flag or "otherwise within the jurisdiction of the United States."<sup>62</sup> Penalties for violation are severe: imprisonment up to two years, a fine up to \$10,000, or both, and forfeiture of the gambling vessel. Since the Act's adoption, operation of luxurious gambling ships apparently has ceased.

*FCC Regulation of Gambling*

While radio give-away shows have no connection with professional crime, many closely resemble lotteries in that prizes are offered to persons selected by lot or chance.<sup>63</sup> In 1934, Congress prohibited licensed stations from broadcasting information concerning any lottery or similar scheme.<sup>64</sup> But no enforcement proceedings have yet been brought under this provision, although the FCC recommended seven cases for prosecution in 1940.<sup>65</sup>

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61. See *Hearings before Subcommittee on Navigation Laws of Committee on Merchant Marine, Radio, and Fisheries on H.R. 408 and S. 2883*, 72d Cong., 1st Sess. (1932).

62. 18 U.S.C. §§ 1081-3 (Supp. 1950). The statute was enacted chiefly in response to the operation of gambling ships off the coast of California. In 1939 the operator of a large gambling ship off the coast of Santa Monica was convicted under the California anti-gambling law, since it was found that the ship was not beyond the three mile limit subject to state jurisdiction. *Time*, Aug. 14, 1939, p. 14. Subsequently, the operator set up a gambling ship outside the three mile limit; and thousands queued up at the shore to be transported to it by water taxis. This time the Federal Government raided the ship, the steamer *Lux*, and successfully libeled it for violating the conditions of a coast-wise license issued by the Treasury Department. *Life*, Aug. 19, 1946, p. 34. To close the loophole where the ship operates without securing a license, the present statute was enacted. Apart from this statute, cardsharps who defraud passengers on any American vessel, regardless of whether or not it is a gambling ship, may be found guilty of larceny. See *Paine v. United States*, 7 F.2d 263 (9th Cir. 1925).

63. A "give-away" may be defined as a program involving some type of scheme whereby a limited number of prizes are awarded to members of the studio or listening audience who participate, voluntarily or involuntarily, in the radio show. While the first of these programs, *Pot O'Gold*, appeared on a major network about ten years ago, they have become one of radio's most popular forms of entertainment only within relatively recent years. In 1948, forty such programs were carried by the major networks; and probably several hundred more were being presented by individual stations. See Comment, *Administrative Enforcement of the Lottery Broadcast Provision*, 58 YALE L.J. 1093, n.19, 1096 (1949).

64. 18 U.S.C. § 1304 (Supp. 1950). Prior to the enactment of this statute, a like provision was incorporated into the Code of Fair Competition of the radio broadcasting industry, promulgated pursuant to the National Industrial Recovery Act. See Haley, *supra* note 41, at 475, n.1.

65. The programs recommended for prosecution were similar to current giveaways. One required the listener to have a loaf of the sponsor's bread in his possession as a

Recently, however, the FCC adopted regulations designating types of programs considered to be in violation of the statute.<sup>66</sup> Broadly interpreted, they cover every type of give-away show on the air today.<sup>67</sup> At present, the regulations are suspended pending court review.<sup>68</sup>

Apart from this statute, the FCC may be able to prohibit radio broadcasting of gambling information by virtue of its authority over program content. While this authority has not been thoroughly tested in the courts, two federal cases upheld refusals to renew licenses because the program was contrary to the "public interest, convenience, or necessity."<sup>69</sup> And in a recent case before

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condition of winning the prize. In two others it was necessary to be listening to the program and to possess special cards secured through purchase of the advertised product. But the Attorney-General evidently considered these programs outside the scope of the lottery statute. See Comment, *FCC Attacks Radio Give-Away Programs*, 1 STAN. L. REV. 475 (1949).

66. 13 FED. REG. 4748, 5075 (1948). The Commission is authorized to refuse to issue or renew licenses to stations violating the regulations. 48 STAT. 1085 (1934), 47 U.S.C. § 309(a) (1946).

67. The regulations apply to any program on which a prize is awarded to a person selected to compete by lot or chance and, as a condition of winning, such person is required: (1) to furnish money or anything of value or have in possession a product of the sponsor; or (2) to be listening to or viewing the program; or (3) to answer correctly a question, where the answer or aid in answering is given on the program; or (4) to answer the phone or write a letter if the phone conversation or letter is broadcast by the station. 13 FED. REG. 4748, 5075 (1948).

68. It is questionable if the regulations will be sustained since they go beyond analogous judicial precedent under the postal anti-lottery statutes. The postal and broadcasting lottery statutes are *in pari materia* and will probably be construed together. See Haley, *supra* note 41, at 478. Under the postal statute, chance has been defined as meaning that the winning of the prize must not be dependent on the skill of the participant, but on an inexplicable cause or fortuity. *E.g.*, *Peek v. United States*, 61 F.2d 973 (5th Cir. 1932). It is difficult, however, to maintain that no skill is involved in answering questions asked by a radio program. However, the fulfillment of the consideration requirement is even a more formidable barrier to the validity of the regulations. The cases hold that a valuable consideration, rather than a technical or nominal consideration, is required for a scheme to be denominated a lottery. *E.g.*, *Affiliated Enterprises v. Gruber*, 86 F.2d 958 (1st Cir. 1936). Listening to or viewing a program could scarcely be called a valuable consideration, in the conventional legal sense.

In addition, the lottery regulations may be struck down because they interpret a section of the Criminal Code, which is considered within the jurisdiction of the Department of Justice. Considerable authority exists for the proposition that the FCC cannot set up regulations interpreting statutes other than the Communications Act. See Comment, 1 MERCER L. REV. 98, 102-106 (1949).

On the other hand, the regulations might be upheld if the courts ignore analogies to the lottery statutes. Licenses could be refused by the FCC if it is determined that the programs described in the regulations were contrary to the "public interest". 48 STAT. 1085 (1934), 47 U.S.C. § 309(a) (1946).

69. *Trinity Methodist Church v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933); *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir. 1931). For discussion of the authority of the FCC to regulate radio program content, see CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 635-43 (1947).

the FCC, a station was denied a license renewal because it devoted large amounts of time to giving horse-racing and other detailed sports information which provided data for persons engaged in unlawful gambling activities.<sup>70</sup>

### *FTC Regulation of Gambling Schemes*

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. . . ."<sup>71</sup> Under this section the FTC has sought to suppress various gambling devices, such as punchboards and push cards,<sup>72</sup> which are used by manufacturers and dealers to stimulate sales of merchandise.<sup>73</sup> The enforcement weapon employed is the cease and desist order.

In recent years the punchboard has developed into a major racketeering enterprise.<sup>74</sup> The FTC estimates that its orders have reached only about 10 or 20 per cent of the firms engaged in selling products by means of gambling or lottery devices.<sup>75</sup> Evidently the cease and desist order is not a sufficient deterrent, and the FTC is not equipped, by itself, to stop the distribution of punchboards and affiliated devices.

### *Summary*

The coverage of present federal laws against gambling is narrow. They hit only at lottery schemes, punchboards, slot machines, and gambling ships.

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70. *In re* Application of Port Frere Broadcasting Co., 5 PIKE & FISCHER 1137 (1950). Accord, *In re* Application of Capital Broadcasting Co., 12 F.C.C. 648 (1948) (station criticized for devoting excessive time to sports programs, although license renewed on strength of other factors appearing in the application).

71. 38 STAT. 719 (1914), 15 U.S.C. § 45 (1940).

72. The commercially promoted punchboard or push card scheme has been described as follows: "The elevator man or perhaps the switchboard operator asks you to 'take a chance on a turkey' at the approach of Thanksgiving or Christmas. You obligingly push out a rolled-up slip of paper from the punchboard, and pay the amount indicated thereon. When a winner is declared, one turkey is presented to that person and another to the elevator man (or whoever)." Jacoby, *The Forms of Gambling*, 269 ANNALS 39, 41 (1950).

73. The leading case is *FTC v. R. F. Keppel & Bros.*, 291 U.S. 304 (1934), in which the Supreme Court upheld the power of the Commission to issue a cease and desist order that selling candy by means of gambling or lottery devices constituted an unfair method of competition with "straight goods" in interstate commerce. In *Chas. A. Brewer & Sons v. FTC*, 158 F.2d 74 (6th Cir. 1946), a slightly different situation was presented; the promoter of the scheme was not a dealer in the industry in which the merchandise was sold, but only sold punchboards and push cards to dealers who in turn used them in selling merchandise to the public. The court affirmed the cease and desist order, on the theory that aiding or inducing others to employ unfair or deceptive practices and competition is unlawful under Section 5 of the Act. See Note, *The Prohibition of Gambling Devices by the Federal Trade Commission*, 47 COL. L. REV. 647 (1947).

74. For a picture of the magnitude of the punchboard industry, see Schendel, *Punchboard Racket*, Collier's, Feb. 10, 1951, p. 11.

75. *Hearings*, *supra* note 13, at 82.

Other gambling schemes or devices escape sanction. And except for the gambling ship statute, penalties have failed to deter violations. Enforcement is also hampered by small staffs. Both a broadening of present federal laws and enactment of more effective controls are, therefore, needed for adequate national regulation of the gambling industry.

#### PROGRAM FOR THE FUTURE

##### *Amendments to Existing Laws*

Under the sponsorship of the Senate Crime Committee, a bill has been introduced to plug certain definitional loopholes in the anti-lottery and slot machine statutes.<sup>76</sup> This measure would prohibit importing, transporting, or mailing "gambling materials" as well as "lotteries, gift enterprises, or similar schemes" in foreign or interstate commerce. This extends the coverage of present laws to all enterprises which contain elements of gambling although they may not satisfy the definition of a lottery. In addition, punchboards and similar devices would be denied use of interstate commerce facilities under penalty of criminal sanctions. In the slot machine statute, the definition of "gambling device" has been broadened to include devices like roulette wheels and to prevent, if possible, interstate transportation of ingenious gambling machines which might fall outside the scope of the definition in the present law. The Committee has emphasized, however, that this amendment is not intended to curb amusement-type pinball machines or wheels of chance and similar devices used at carnivals and fairs.<sup>77</sup>

##### *Prohibition of Interstate Transmission of Gambling Information*

Bookmaking, probably the largest and most profitable illegal business in the United States,<sup>78</sup> depends greatly on interstate communication facilities. For example, a successful horse book requires up-to-the-minute information on racing news and large betting volume. These necessities are supplied by national racing-news services which send current information such as odds fluctuations and probable starters over interstate wires, thus permitting bettors to play their money on races in various parts of the country.<sup>79</sup> When

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76. S. 1624, 82d Cong., 1st Sess. § 1301 (1951).

77. 97 Cong. Rec. 6432-3 (June 8, 1951).

78. Bookmaking is accepting and placing bets off the tracks. The annual business is estimated to be about \$8 billion. Lawrence, *supra* note 9, at 46 (1950).

79. The spectacular development of the racing-news services is a fascinating story of gang warfare and ruthless monopoly control. In brief, several small independent wire services were organized by one John Payne in 1927. Subsequently, Payne lost control of his companies to a Chicago group; but by 1939 the notorious Moe Annenberg had succeeded in monopolizing the entire field. After Annenberg's conviction in 1940 on an income tax charge, the services were again split up and are now dominated by two companies, Trans-American Publishing and News Services, Inc., controlled by members of the old Capone gang, and Continental Press Service, the remnant of the old Annenberg

an entrant receives an inordinate amount of play, the bookmaker protects himself by betting some of the excess with another bookie, often via interstate telephone, or by placing large last-minute bets with agents at the tracks to reduce odds on the horse involved. Such hedging operations are known as "lay off" and "come back" bets. In sum, fast communication is important for large bookmaking businesses.

The Senate Crime Committee has proposed three bills to curb gamblers' use of interstate communication facilities. Probably the most significant of these is one intended to wipe out racing-news services. This proposal requires all persons engaged in interstate dissemination of any information concerning horse or dog-racing events or betting information on any other sporting event to obtain a special license from the FCC.<sup>80</sup> The licenses are to be granted to any applicant unless the Commission determines that the granting would not be in the "public interest," that the applicant is not of "good moral character," or that the information is disseminated primarily to aid gambling activities which violate laws of states in which such information will be disseminated.<sup>81</sup> Excepted from these licensing requirements and the Act as a whole, however, are newspapers of "general circulation" and regular licensed broadcasting stations.<sup>82</sup> In addition, every common carrier or other supplier of information concerning racing and sporting events is required to maintain a list of its receiving and sending points to be open to inspection by appropriate local, state, and federal law-enforcement agencies.<sup>83</sup>

A different approach was taken in the so-called "bookie bill," approved after extensive hearings by the Senate Committee on Interstate and Foreign Commerce in 1950.<sup>84</sup> This measure flatly prohibits transmission of "gambling information" in interstate and foreign commerce through communication

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syndicate. For a detailed account, see SEN. REP. No. 141, 82d Cong., 1st Sess. 15-26 (1951).

Mechanically, the services operate as follows. Racing information is either obtained trackside or by other means. But no matter how obtained, the information is placed upon circuits, usually leased telegraph circuits, supplemented by long-distance telephone, running to the major cities of the country, from whence it is further farmed out to other leased circuits, or in some cases by local radio broadcast. Thus, there is a process of subdistribution which may be multiplied several times before it reaches the bookmaking establishments all over the country. For further information on this process, see FCC, STAFF REPORT ON EXTENT OF COMMUNICATION FACILITIES USED IN DISSEMINATION OF RACING INFORMATION, PURSUANT TO ORDER No. 117 (1944).

80. S. 1563, 82d Cong., 1st Sess. § (a) (1951).

81. *Id.* § (b).

82. *Id.* § (g).

83. *Id.* § (f).

84. S. 3358, 81st Cong., 2d Sess. (1950). The bill was drafted by the legislative committee of the Attorney General's Conference on Organized Crime, and was the latest of 29 similar measures submitted to Congress since 1900. For citations, see *Hearings before Subcommittee of Committee on Interstate and Foreign Commerce on S. 3358*, 81st Cong., 2d Sess. 935 (1950).

facilities.<sup>85</sup> An exception permits transmission of gambling information intended solely for printed publication purposes;<sup>86</sup> and radio and television broadcasting of sporting events is allowed, except that in horse races, gambling information cannot be broadcast prior to the start of a race on the day it is to be run, or during a one hour period following the finish of the race.<sup>87</sup> The bill requires conforming tariffs to be filed with the FCC by common carriers,<sup>88</sup> and authorizes these carriers to refuse or discontinue services to persons using the facilities for transmission of gambling information—a sanction that has already received judicial approval.<sup>89</sup>

The “bookie bill” seems a more effective measure than the recent licensing proposal of the Senate Crime Committee. Direct prohibition of interstate transmission of gambling information avoids possible loopholes in the licensing provisions. Conceivably, the FCC could license applicants (or would be so required by the courts) who disseminate betting information, but nevertheless meet the vague tests outlined in the measure.<sup>90</sup> In addition, the exemption of radio broadcasters in the licensing proposal is a serious flaw. Quick broadcasting of racing results and betting prices, together with odds on following races, is already of great value to bookies and might prove a lifesaver if the regular wire services were cut off.<sup>91</sup>

Both bills share other weaknesses. The exception of newspapers from the statutory proscriptions is the primary one. Most small bookmakers operate without benefit of wire services, relying mainly on information published in newspapers;<sup>92</sup> and the entire bookmaking industry may revert to this medium if either bill is enacted with this loophole. Secondly, both bills have weak enforcement provisions. Only the common carriers are subject to punishment under the “bookie bill”; the racing-news services which send the illegal information or the bookmaking establishments which receive it are untouched.

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85. S. 3358, 81st Cong., 2d Sess. (1950).

86. *Id.* § 3(b).

87. *Id.* § 4.

88. “The Federal Communications Commission shall require all common carriers subject to its jurisdiction to file appropriate tariff practices and regulations to give effect to the provisions of this Act. . . .” *Id.* § 6(a) (1950).

89. In *McBride v. Western Union Telegraph Company*, 171 F.2d 1 (9th Cir. 1948), the telegraph company, upon notice from state police that gambling information was being transmitted to certain telegraph drops, discontinued service to the sender, Continental Press Company, on the authority of a tariff filed with the FCC stating that facilities would not be used for any purpose in violation of state or federal law. The discontinuance action was upheld by the federal circuit court. For discussion of this case and other cases on the question of whether utility service can be legally withheld from such users as bookmakers and wire news services, see Bachelder, *The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities*, 40 J. CRIM. L. & CRIMINOLOGY 176 (1949).

90. See p. 1410 *supra*. The FCC has complained that it would be almost impossible to administer these tests. See *Hearings, supra* note 36, pt. 12, at 565.

91. See letter by Hon. Wayne Coy, Chairman, FCC, in N.Y. Times, Aug. 20, 1951, p. 25, col. 7.

92. See Lawrence, *supra* note 9, at 49-50.



Furthermore, the only enforcement weapon against violation of licenses granted under the Committee's proposal is the cease and desist order.<sup>93</sup>

Such defects, however, may be necessary. Prohibiting publication of betting information may cross the line of desirable limitations on freedom of the press.<sup>94</sup> In the "bookie bill," items like weight handicaps of horses and condition of the track might be construed as "gambling information" even though they are of interest to sports lovers as well as gamblers. If Congress goes this far, the precedent might someday support bans on transmission of many other kinds of information. Furthermore, severe penalties in these bills may not be desirable prior to a reasonable testing period.

Two bills introduced in Congress by the Senate Crime Committee supplement its licensing proposal. The first covers in part the same ground as the "bookie bill" by imposing criminal penalties on anyone who knowingly transmits in interstate or foreign commerce by telephone, telegraph, or radio, any bet or wager, or offer of money in payment of one.<sup>95</sup> This measure would harass and, in many cases, prevent bookmakers from placing their vital "lay off" and "come back" bets. It would also curb syndicated basketball, football and baseball betting, whose operators deal almost exclusively through interstate telephone and telegraph communication.<sup>96</sup> The second bill is designed to prevent surreptitious transmission of information about racing events to gamblers from agents located at or near the tracks. This bill is needed since wire-service operators, denied the right to send out betting information by many race track proprietors, have been gaining the information outside the tracks from agents located inside.<sup>97</sup>

These latter bills should survive constitutional attack. Bets or wagers or information transmitted solely between gamblers are not useful for any purpose except gambling; prohibition should be sustained by analogy to the

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93. 48 STAT. 1092 (1934), 47 U.S.C. § 401 (1946). However, a general penalty provision exists which imposes criminal sanctions on persons who wilfully and knowingly fail to obtain licenses according to the provisions of the Act. 48 STAT. 1100 (1934), 47 U.S.C. § 501 (1946).

94. In Michigan it is unlawful for any person to publish any information concerning the making or laying of wagers or bets on any race, contest, or game. 25 MICH. STATS. ANN. § 28.537 (1938). This statute has been held constitutional insofar as it prohibits the publication of betting odds before the event takes place—the vital time for potential gamblers. *Parkes v. Bartlett*, 236 Mich. 460, 210 N.W. 492 (1926); Note, 40 HARV. L. REV. 654 (1927). The decision cannot be taken to mean, however, that prohibition of peripheral betting information of interest to the general public *i.e.*, jockeys, weights, etc., would also survive constitutional objection.

95. S. 1624, 82d Cong., 1st Sess. § 1304 (1951). The "bookie bill" prohibits interstate transmission of "gambling information" as well as bets or wagers; the Committee's proposals, taken together, flatly bar transmission of bets or wagers but only set up a licensing system with regard to dissemination of gambling information. See pp. 1410-11 *supra*.

96. See SEN. REP. NO. 307, 82d Cong., 1st Sess. 160-1 (1951).

97. S. 1564, 82d Cong., 1st Sess. (1951). See SEN. REP. NO. 725, 82d Cong., 1st Sess. 89 (1951). Criminal sanctions are imposed for violation.

anti-lottery laws.<sup>98</sup> An objection to the first bill is, however, that as drafted it strikes indiscriminately at all users of interstate communication facilities. Any casual bet made by interstate telephone could be made the basis for prosecution under the bill's language. On the other hand, it seems impossible to draft an effective measure that would curb only large-scale interstate betting. Leaving the matter of whom to prosecute to the Department of Justice seems the best alternative. The Senate Crime Committee has emphasized that the only purpose of the bill is to stop the operations of professional gamblers.<sup>99</sup> It is unlikely that the Department will negative this intention by loosing a flood of prosecutions for casual use of interstate facilities.

### *Regulation of Gambling by Taxation*

Discriminatory changes in the income and excise tax laws may be another way the Federal Government can limit gambling. Constitutional restrictions and enforcement difficulties are the chief problems that must be faced here.

*Gambling expense deductions.* The Senate Crime Committee has recommended that no wagering losses, expenses, or disbursements of any kind, incurred in or as a result of illegal gambling (under, presumably, either state or federal law) should be deductible for income-tax purposes.<sup>100</sup> Deduction of gambling losses is now permitted to the extent of gambling gains.<sup>101</sup> The Supreme Court has said, however, that "every deduction allowed from gross income is given as a matter of legislative grace."<sup>102</sup> It is true that in 1925, rulings by the Commissioner of Internal Revenue that expenses and losses from an illegal business were not deductible from gross income were overruled by the Board of Tax Appeals.<sup>103</sup> But Congress itself never made such losses non-deductible; and the cases indicate that clear Congressional determinations on deductions will not be upset by the courts.<sup>104</sup>

*Tax on wagers.* The new Internal Revenue Act imposes a 10 per cent excise tax on all wagers.<sup>105</sup> It excepts licensed pari-mutuel betting, slot

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98. Prohibition of lottery matter from the mails has been upheld by the Supreme Court. *In re Rapier*, 143 U.S. 110 (1892).

99. SEN. REP. No. 725, 82d Cong., 1st Sess. 89 (1951).

100. S. 1532, 82d Cong., 1st Sess. (1951).

101. INT. REV. CODE § 23(h). At present, "legitimate" expenses of illegal businesses are also deductible. For example, gambling houses have been permitted to deduct wages of gaming table operators. *G. A. Comeaux*, 10 T.C. 201 (1948); *Fred D. Clemons*, 7 CCHTCM 81 (1948); *Ralph L. Polk*, 7 CCHTCM 51 (1948); all *aff'd*, 176 F.2d 394 (10th Cir. 1949).

102. *White v. United States*, 305 U.S. 281, 292 (1938).

103. *McKenna's Appeal*, 1 B.T.A. 326 (1925) (gambling losses of professional gambler held deductible).

104. *E.g.*, *White v. United States*, 305 U.S. 281 (1938); *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1933).

105. Pub. L. No. 183, 82d Cong., 1st Sess. § 471 (Oct. 20, 1951), INT. REV. CODE § 3285(a). This tax is not a proposal of the Senate Crime Committee.

machine play, and gambling games like dice or roulette where the bets are placed, winners determined, and prizes distributed in the presence of all participating individuals.<sup>106</sup> Each person engaged in the business of accepting wagers, or conducting wagering pools or lotteries, is liable for this tax.<sup>107</sup> Such persons must also file a special registration form for the tax, and pay an occupational levy of \$50 per year.<sup>108</sup> Failure to pay either the wagering or registration tax subjects gamblers to a fine of \$1000 to \$5000, in addition to the tax.<sup>109</sup> Willful violators can be fined up to \$10,000 and imprisoned up to five years.<sup>110</sup>

What success the new law will have in deterring gambling is difficult to predict. Preliminary evidence indicates that many bookmakers and lottery enterprises fear that the 10 per cent tax may put them out of business.<sup>111</sup> Passing the cost on to the horseplayer would probably prove of little assistance; the latter might well stop gambling rather than suffer this imposition. Evasion of the law is dangerous in view of the sizable penalties. Moreover, the Internal Revenue Bureau intends to mail registration forms to known gamblers to remind them of their legal obligation.<sup>112</sup> Belief that the measure is unconstitutional is ill-founded, since other destructive and discriminatory excise taxes have been upheld by the Supreme Court.<sup>113</sup>

In addition, gamblers may be unwilling to register as "engaged in the business of accepting wagers" since these statements would proclaim them as violators of state anti-gambling laws. Gamblers who have disguised their true sources of income in federal tax returns would expose themselves to prosecution if their real occupation were now revealed. On the other hand, gamblers who do register may prevent arrests by large "protection" payments. Thus, corruption might increase rather than diminish as a result of the new law.

Most probably, bold gamblers will either evade the law entirely or register and pay the 10 per cent tax on only a small proportion of the total wagers they

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106. *Id.* § 3285(b), (e).

107. *Id.* § 3285(d).

108. *Id.* §§ 3290, 3291.

109. *Id.* § 3294(a).

110. *Id.* § 3294(c).

111. N.Y. Times, Oct. 31, 1951, p. 24, col. 2.

112. *Ibid.*

113. If the tax on its face is a revenue measure, it is not invalid because it burdens or restricts the thing taxed. *Sanchez v. United States*, 340 U.S. 42 (1950) (tax of \$1000 per ounce on transferors of marihuana valid exercise of taxing power notwithstanding its collateral regulatory purpose and effect); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (heavy license tax on dealers in firearms sustained); *McCray v. United States*, 195 U.S. 27 (1904) (oleomargarine tax valid). Where the taxing statute openly expressed regulatory features, however, the Supreme Court held it invalid. *E.g.*, *United States v. Constantine*, 296 U. S. 287 (1935) (liquor tax); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (child labor tax). There is no indication of regulation on the face of the new wagering tax.

For other citations on the validity of the destructive tax, see Comment, *The Use of Taxation to Control Organized Crime*, 39 CAL. L. REV. 226, 232 (1951).

receive. Prosecutors will be faced with the difficult task of proving total gambling income. To enforce this law and the deduction measure previously discussed, the Bureau of Internal Revenue must enlarge its staff and carefully examine the tax returns of known gamblers. Recent criticism of the Bureau should help bring this about.<sup>114</sup> The Senate Crime Committee has suggested that the Bureau strictly enforce regulations requiring taxpayers to keep adequate records of income and expenses—a notorious omission by gamblers.<sup>115</sup> The Committee would also make failure to keep records a felony.<sup>116</sup> The Bureau itself recently organized a special racket squad of picked men to investigate tax returns and track down tax frauds of gamblers.<sup>117</sup> Only with such vigorous enforcement can the wagering tax law and the denial of deductions for gambling expenses severely restrict the gambling industry.

### *Investigation and Study of Gambling Activities*

In addition to the statutory prohibitions discussed above, gambling cannot be minimized or controlled effectively without further study of the character and extent of its operations. Accordingly, the Senate Crime Committee recommends that a National Crime Coordinating Council be formed, composed of representatives of privately established local crime commissions, to afford centralized guidance and coordination to communities' efforts to combat gambling and other criminal activities.<sup>118</sup> At an earlier date, the Committee suggested that organized interstate crime be studied by an independent Federal Crime Commission in the executive branch of the government,<sup>119</sup> and a bill to that effect is now pending in the Senate.<sup>120</sup> Opposition by various govern-

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114. The Senate Crime Committee revealed that the Bureau of Internal Revenue has accepted general statements of income and expenses from gangsters and their political allies which would not be accepted from ordinary citizens. See SEN. REP. No. 141, 82d Cong., 1st Sess. 31-3 (1951).

115. S. 1531, 82d Cong., 1st Sess. (1951). The bill would impose a definite statutory requirement on all taxpayers to preserve the records supporting their income-tax returns for seven years. Other related tax proposals by the Senate Crime Committee are: S. 1529, 81st Cong., 1st Sess. (1951), which would require gambling casinos to maintain daily totals of winnings and losses in order to facilitate collections, and S. 1660, 81st Cong., 1st Sess. (1951), which would require any taxpayer who reports more than \$2,500 as income from unlawful sources, for the current year or any of the 5 years prior thereto, to append a statement of his net worth to his return.

116. S. 1531, 82d Cong., 1st Sess. (1951).

117. See SEN. REP. No. 307, 82d Cong., 1st Sess. 9 (1951).

118. SEN. REP. No. 725, 82d Cong., 1st Sess. 6 (1951). The functions of the Council would be:

- (a) To foster establishment of local crime commissions.
- (b) To serve as a clearinghouse for information of interest to the local commissions.
- (c) To study new patterns in organized crime and report the results to appropriate agencies and legislative bodies.
- (d) To sponsor meetings for the purpose of exchanging ideas and information regarding local crime conditions.

119. SEN. REP. No. 307, 82d Cong., 1st Sess. 8 (1951).

120. S. JOINT RES. 65, 82d Cong., 1st Sess. (1951).

mental departments,<sup>121</sup> however, makes its enactment highly doubtful; it is probable that the private Coordinating Council must suffice for the present time.

Another private national crime committee is already in operation. On the initiative of the Attorney-General, nine prominent sports leaders are studying the influence of gambling on professional and amateur sports.<sup>122</sup> The committee may come up with recommendations not suggested by the Senate Crime Committee, including, possibly, a federal law which would punish those who offer bribes to athletes.<sup>123</sup>

#### CONCLUSION

The anti-gambling bills proposed by the Senate Crime Committee are now receiving hearings in Congress.<sup>124</sup> Social legislation of this kind should be considered in light of two chief criteria: how effectively the measures will accomplish their avowed purposes; and how successfully they avoid infringing individual liberties. On the whole, the proposals measure up well. Only professional gambling operations are curbed; and possible violations of the First Amendment have been scrupulously avoided. Where compromise was necessary, effectiveness rather than individual rights has been sacrificed. Measures of greater severity should not be enacted until experience is gained under the present bills. Gambling may diminish as a social problem, rendering drastic laws unnecessary. At present, therefore, the relatively mild proposals of the Committee seem the best method for attacking the evils of America's gambling industry.

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121. See SEN. REP. NO. 725, 82d Cong., 1st Sess. 96 (1951).

122. N.Y. Times, Sep. 2, 1951, p. 1, col. 2.

123. This recommendation was made by the nation's collegiate basketball coaches. N.Y. Herald Tribune, March 28, 1951, p. 27, col. 5.

124. The Senate Crime Committee has proposed several other laws in fields unrelated to or peripheral to gambling: narcotics; liquor traffic; unlawful entry by aliens; criminal tactics in transportation; matters relating to the Government's right of appeal in criminal cases; and conduct of congressional investigations. For substance and citations of these bills, see SEN. REP. NO. 725, 82d Cong., 1st Sess. 90-6 (1951).